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## THE COLLECTIBILITY OF SPECIAL ASSESSMENTS MORE THAN TEN YEARS DELINQUENT

PEYTON B. ABBOTT\*

The collection or foreclosure of the lien of any installment of special assessments upon real estate for local improvements is barred after ten years from the date such installment became due and payable. This is the import of the decision in the recent case of *Raleigh v. Mechanics and Farmers Bank*,<sup>1</sup> where the court, in a four to three decision, held that C. S. 2717(a)<sup>2\*</sup> is an independent ten-year statute of limitation which operates to bar foreclosure of installments more than ten years past due even when suit is instituted under the provisions of C. S. 7990.<sup>3\*</sup>

The year before, a unanimous court had handed down a similar ruling in the case of *Charlotte v. Kavanaugh*.<sup>4</sup> But five years before that, the court had stated, in *Asheboro v. Morris*,<sup>5</sup> which was also a suit to foreclose the lien of a street assessment: "Where the sovereign elects or chooses to proceed under C. S. 7990, no statute of limitations is applicable." The *Charlotte* Case apparently did not attract very wide attention outside of the City of Charlotte, possibly because a large part

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<sup>1</sup> 223 N. C. 286, 26 S. E. (2d) 573 (1943).

<sup>2\*</sup> N. C. CODE ANN. (Michie, 1939) §2717(a). It reads as follows: "Sale or foreclosure for unpaid assessments barred in 10 years; no penalties. No statute of limitation, whether fixed by law especially referred to in this chapter or otherwise, shall bar the right of the municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, and whether such assessment is made under this chapter or under other general or specific acts, save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default in the payment of any installments. No penalties prescribed for failure to pay taxes shall apply to special assessments, but they shall bear interest at the rate of six per cent per annum only. In any action to foreclose a special assessment the cost shall be taxed as in any civil action, and shall include an allowance for the commissioner appointed to make the sale, which shall not be more than five per cent of the amount for which the land is sold, and one reasonable attorney's fee for the plaintiff. This section shall apply to all special assessments heretofore or hereafter levied, but shall not apply to any special assessment for the collection of which an action or proceeding has heretofore been instituted (1929, c. 331, s. 1)."

<sup>3\*</sup> N. C. CODE ANN. (Michie, 1939) §7990. Numerous cases have held that no statute of limitations is applicable to a suit to foreclose the lien of *ad valorem* taxes instituted under this statute. See cases cited in *Asheboro v. Morris*, 212 N. C. 331, 193 S. E. 424 (1937).

<sup>4</sup> 221 N. C. 259, 20 S. E. (2d) 97 (1942).

<sup>5</sup> 212 N. C. 331, 193 S. E. 424 (1937).

of the decision was concerned with the validity of local acts.<sup>6\*</sup> And it was true, as pointed out by the majority opinion in the *Raleigh* Case, that C. S. 2717(a) was not involved and appears not to have been called to the attention of the court in *Asheboro v. Morris*. So, when the appeal in the *Raleigh* Case came on for determination, the court apparently treated the question presented almost as one of first impression. Both the majority and minority expressed the desirability of examining "with cold neutrality" the legal effect of the statute. Deep-seated conviction as to both policy and precedent is apparent from reading the majority and minority opinions.

The majority of the court could and did argue with considerable force that before the enactment of C. S. 2717(a) there were a number of local acts prescribing periods of limitations of varying lengths; that some cases had suggested the applicability of the regular three-year statute to special assessment foreclosure actions; and that C. S. 2717(a) was intended to provide a definite state-wide ten-year statute and end the confusion in this field. It added strength to its argument by pointing out that the caption of the section, "Sale or Foreclosure for Unpaid Assessments Barred in Ten Years," was enacted as a part of the statute. And it buttressed its position by the decision in *Charlotte v. Kavanaugh*, *supra*.

The minority could and did argue with considerable force that C. S. 2717(a) was intended to do no more than extend to ten years such shorter periods of limitation as might be provided by pre-existing statutes; that the General Assembly did not intend to provide an independent ten-year statute where none existed before; that the statute is somewhat ambiguous and such ambiguity should be resolved in favor of the sovereign, in this case the municipality acting in its governmental capacity; that numerous cases had previously held that no statute of limitations is applicable where suit to foreclose taxes is instituted under C. S. 7990. And it buttressed its position by the language in *Asheboro v. Morris*, quoted above.

No useful purpose would be served by entering into a discussion of the many cases cited by both the majority and minority; for none of these cases (except *Charlotte v. Kavanaugh*) dealt directly with the question before the court—the effect of C. S. 2717(a).<sup>7\*</sup>

<sup>6\*</sup> Following the *Charlotte* Case, C. S. 2717(a) was amended by Ch. 181, Sess. Laws 1943, to raise the statute of limitations from ten to fifteen years, applicable to the city of Charlotte only. The Act expressly provided that it should not be construed to revive any right of action which had been theretofore barred. Local acts were also passed with reference to the time allowed for the collection of assessments in the towns of Aulander and Morehead City. N. C. Sess. Laws 1943, c. 235, c. 420.

<sup>7\*</sup> For example, in *Farmville v. Paylor*, 208 N. C. 106, 179 S. E. 690 (1935), which was an action to foreclose a special assessment lien, the defendant pleaded a ten-year statute, though it is not clear just which one, whether C. S. 2717(a) or

The apparent effect of the decision in the *Raleigh* Case is to place in jeopardy, if not to bar, the collection of hundreds of thousands of dollars in delinquent assessments in cities and towns throughout North Carolina. If this money is lost, it must be made up through general taxation. Some cities which have been able to set up tidy capital reserves for a rainy day or for postwar reconstruction may find that it has already rained and that those reserves have, in effect, been more than washed out. The following study was undertaken in an effort to discover whether those delinquent assessments must indeed be counted as lost and gone forever. Is a way still open through which those assessments may yet be collected?

In the light of the *Raleigh* Case, must all installments more than ten years delinquent be counted a total loss? This question may be broken down into two sub-questions: (1) Assuming that actions to foreclose installments have become barred by C. S. 2717(a), can the legislature by subsequent action revive such rights of action?<sup>7\*</sup> (2) Has the legislature already enacted legislation which may enable municipal corporations to save their assessments from the bar of the statute?

C. S. 437 (actions on judgments). However, this was not material since the court held that ten years had not elapsed since the accrual of the right of action. The *Farmville* Case cited *High Point v. Clinard*, 204 N. C. 149, 167 S. E. 690 (1933), another assessment foreclosure case also cited in the *Raleigh* Case. In the *High Point* Case, the court held that the three-year statute did not apply, because a ten-year statute did apply, as held in *Drainage District v. Huffstetler*, 173 N. C. 523, 92 S. E. 360 (1917). The *Drainage District* Case was also cited in the *Raleigh* Case, but that case was decided twelve years before C. S. 2717(a) was enacted and the ten-year statute therein mentioned was C. S. 437. Again, in both the *High Point* and *Drainage District* Cases, ten years had not elapsed since the accrual of the action and the point before the court was the applicability of the three-year statute. In *Statesville v. Jenkins*, 199 N. C. 159, 154 S. E. 15 (1930) C. S. 2717(a) was pleaded as a defense, but no question of construction was involved as the court held that it did not apply to the particular situation.

<sup>7\*</sup> This assumption must be restricted to actions brought under C. S. 7990, which was the type of action with which both *Charlotte v. Kavanaugh* and *Raleigh v. Mechanics and Farmers Bank* were concerned. It would seem that where actions to foreclose certificates of sale of the lien of special assessments under Section 1719 of Chapter 310, P. L. 1939 (The Machinery Act of 1939) may be brought, no statute of limitations is provided. In this connection it may be noted: (1) that Sec. 2(32) of the Act defines "tax" or "taxes" to mean and include "any taxes, special assessments, costs, penalties, and/or interest imposed upon property or other subjects of taxation"; (2) that Sec. 1719(a) of the Act provides that "Actions for the foreclosure of tax liens (which by definition, include special assessment liens) brought under this section shall be brought not less than six months after the sale hereinbefore provided for," without further limitation; (3) that C. S. 8037, which formerly provided a two-year statute of limitations upon actions to foreclose tax and assessment sales certificates, was expressly repealed by the Machinery Act; and (4) the Machinery Act was enacted ten years later than C. S. 2717(a), and since it now provides a procedure for the foreclosure of special assessments without any period of limitations, C. S. 2717(a) would appear to limit only those actions brought under C. S. 7990.

1. CAN THE LEGISLATURE REVIVE INSTALLMENTS BARRED  
BY C. S. 2717(a)?

The usual reaction of lawyers, both before the bar and on the bench, is to take a running jump at such a question as this and answer quickly, "no," especially when it is not necessary to answer the question definitely in order to decide the case at hand. Also, the text-writers have generally placed North Carolina among the jurisdictions holding that once a right of action has been barred by a statute of limitations, the legislature is powerless to revive the right of action by subsequent legislation, usually citing *Whitehurst v. Dey*,<sup>8</sup> and other cases supported by that case, as their authority. In spite of those cases, in spite of the text-writers, and in spite of the impulse of lawyers to give quick and unqualified answers, a study of the cases where the question had to be answered, directly and definitely, in order to decide the case before the court reveals that the "no" is subject to considerable qualification.

One of the earliest cases in which the question was directly presented to the court arose upon a petition for dower.<sup>9</sup> A will had been probated in November, 1864, and the dissent of the widow and petition for dower was not filed until May, 1866. The defendants, devisees under the will, pleaded the six months statute of limitations contained in the Act of 1784, which the court held to be a six months limitation upon the right of a widow to dissent. But the court held that the Act of February, 1866, giving widows further time to dissent, was constitutional and applied it to the case at bar although at the time of its passage the plaintiff's right of action was already barred under the Act of 1784. Said the court (p. 415): "Suppose a simple contract debt created in 1859. In 1862 the right of action was barred by the general statute of limitations, which did not *extinguish the debt*, but simply barred the right of action. Then comes the Act of 1863, providing that the time from 20 May, 1861 (to the close of the war) shall not be counted. Can the debtor object that this deprives him of a vested right? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, the operation of which is for a season suspended.

"So the Act of 1784 does not *extinguish* the widow's common law right of dower, but simply bars her right of action, unless she enters her dissent within six months and makes claim to her right of dower within that time. Then comes the Act of February, 1866, providing that she shall have further time. Can the devisee object that this deprives him of his land? Surely not. It only takes from him the privilege of claiming the benefit of a former statute, whereby to bar the widow's common law right."

<sup>8</sup> 90 N. C. 542 (1884).

<sup>9</sup> *Hinton v. Hinton*, 61 N. C. 410 (1868).

Vested rights? If the estate was solvent, the devisees found the title which had become absolute by reason of the widow's failure to act in time again subjected to her claim for dower. If the estate was insolvent, the creditors found the means for the satisfaction of their claims reduced to the extent of the dower right thus revived.

An act authorizing the retroactive assessment of real estate for taxes, enacted after the statutory time for levying assessments had elapsed, was approved in *Railroad v. Commissioners*,<sup>10</sup> a case directly in point with the question we are considering. Chapter 158, Laws of 1879, reciting that the railroads had failed to pay their proper state and county taxes upon a large amount of real and personal property in the county of Alamance for the years 1869 to 1876 inclusive, due to failure to list, recovery of illegal assessments, litigation and other causes, authorized the county authorities to revise and correct the tax lists of said railroads for the specified years.<sup>11\*</sup> The railroad sought to enjoin the commissioners from carrying out the provisions of the act upon the ground (among others) that the time for collecting the taxes under the pre-existing law had expired, and that the act of 1879 was retroactive and unconstitutional.<sup>12\*</sup>

While the court admitted that it was being virtually called upon to decide a case in advance of its trial upon the merits, it held that the legislature could extend the right to assess property and collect taxes thereon, although the time fixed by the statute in effect had expired. At p. 266 the court said: "The retrospective features of the act are not fatal to its validity. It does not undertake to impose new burdens or additional liabilities upon the companies, but to pursue and charge the taxable property which they possessed and which has escaped its share of the common burden. It seeks nothing more. No vested rights are invaded; no wrong done by the means employed to correct a common error and prevent an unjust and unintended exemption. Remedial in its scope and operation, it undertakes to provide against the consequences of the omission and neglect of public agencies and to have now done what ought to have been done before. . . .

"The State has a lien upon land for taxes actually levied and also for such as were properly put upon the land, but by reason of the neg-

<sup>10</sup> 82 N. C. 259 (1880). *Hinton v. Hinton* was cited and approved in this case.

<sup>11\*</sup> For the background of litigation see: *Railroad v. Commissioners of Orange*, 77 N. C. 4 (1877); *Railroad v. Commissioners of Alamance*, 76 N. C. 212 (1877); *Railroad v. Commissioners of Brunswick*, 72 N. C. 10 (1875).

<sup>12\*</sup> The court had held, in *Railroad v. Commissioners of Alamance*, 77 N. C. 4 (1877) that the pertinent sections of the then current revenue law meant that "lands cannot be listed or taxed (either by the owner or by the county commissioners) under the revenue law for a year preceding the current year. So that if any real estate liable to taxation thus escapes being listed, no tax is due or collectible. . . ."

lect of the officers entrusted with the duty of assessing it the land was omitted for a particular year. . . . The legislative authority given to tax the property for the omitted years is not exhausted by the failure of the party or the assessor to place it on the roll, and such assessments are valid. . . . There are numerous instances in our own legislation where the time for the collection of unpaid taxes has been extended to those due for many years previous, for the indemnity and reimbursement of the collecting officer and the sureties on his official bond and their legal representatives, without question, so far as we know, as to the competency of the Legislature to make the enactment."

In *Wilmington v. Cronly*,<sup>13\*</sup> which cited with approval *Railroad v. Commissioners of Alamance*, *supra*, the court held valid an act which authorized a town to collect taxes which had become uncollectible many years before the passage of the act. With respect to the statute of limitations, the court said (p. 387): "It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi*—and the act in question authorizing the State, county and city to recover these delinquent taxes contains no limitation, and neither the ten years nor the three years statute applies."

From this language it is apparent that the court construed the Act of 1895 not merely as one to suspend the statute of limitations, or to lift the bar of the statute, but as an Act conferring an independent right to collect back taxes that were not collected within the time previously given. That is, the Act is something of a "recapture" statute, authorizing collection of former legal obligations and based upon the fact of non-payment.<sup>14\*</sup>

<sup>13\*</sup> 122 N. C. 383, 30 S. E. 9 (1898). This was an action instituted in 1896 under authority of Ch. 182, Pub. Laws 1895 to subject real estate to sale to satisfy taxes for as far back as 20 years, taxes for the years 1875, 1876, 1877, 1881, 1885, 1886, 1891 and 1892 being involved in the suit. Ch. 182, Pub. Laws 1895 was entitled "An Act to provide for the collection of arrearages of taxes in the City of Wilmington, in the County of New Hanover, and State of North Carolina." The Act set no time limit upon the retrospective operation of its provisions, nor did it contain any repealing clause as to any public or local act. The defendant pleaded the ten-year statute of limitations and also Ch. 198, Laws of 1858-59 entitled "An Act concerning the Town of Wilmington" which provided, relative to sales for taxes (sec. 3), that "no sale of any land for taxes shall be made sooner than three months after such taxes have been laid or imposed, or later than three years thereafter." The lower court held that the ten-year statute of limitations applied, but that the three-year statute did not. Both parties appealed, the appeals being separately reported. Neither statute was held applicable. On defendant's appeal, the court (Clark, J.) said (p. 385): "The right of taxation is the highest and most essential power of government (*R. R. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652), and is necessary to its existence. All who are liable to the payment of taxes should pay their legal share. Those who fail to do so simply devolve its payment upon others, for taxes being essential to the existence of government, if any do not pay, others have to pay for them. It justly follows that if taxes are not paid within the statutory time, the legislature can authorize the collection of such arrearages notwithstanding."

<sup>14\*</sup> This construction is borne out in the court's discussion of plaintiff's appeal.

Whatever the theory of the statute—whether it lifted the bar of the statute of limitations or conferred an independent right to levy and collect taxes based upon the non-payment of taxes which had become legally uncollectible, the reasoning of the court and the effective result would appear to apply with equal force to a statute which would enable local units to assess and collect “taxes” or “assessments” upon real estate which, by reason of neglect, misapprehension as to the law, unwarranted indulgence on the part of local officials or other causes, has escaped its fair share of the cost of local improvements, such assessments and collection to be based upon the fact of non-payment of previous assessments, valid when made.

In *Jones v. Arrington*<sup>15</sup> an act which revived, for the benefit of an individual, the power to collect back taxes after the power had lapsed was held valid. This presents a situation much less worthy of legislative assistance and judicial sympathy than does the plight of cities and towns which must consider making up by general taxation those special assessments which have become uncollectible through the passage of time. And it would seem that the person who is finally made to pay his fair share of improvements which have especially benefitted his property, rather than being allowed to pass this burden along to others, has even less cause for complaint than the defendant in *Jones v. Arrington*, where a general tax was involved.

Jones, former sheriff of Warren County, had duly settled for taxes for the years 1873 to 1881 inclusive, but had not collected all of said taxes and the time for collecting had expired. The Legislature authorized him to collect such taxes, “under the same rules and regulations as are prescribed by law for the regular collection of taxes, and the power

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The court said (p. 391): “In fact, however, it is the latter, for as we said in *Jones v. Arrington*, 91 N. C. 125 (at p. 130), an act to collect arrearages of taxes is not an enactment that attempts to revive a demand that has been barred by the statute of limitations, which would be repugnant to the Constitution of the United States, as was recently declared in *Whitehurst v. Dey*, 90 N. C. 542. The act of 1895 is the act of the sovereign directing the collection of taxes for the years in which the delinquent’s property has not paid its quota, as required by law, to the support of the public burdens and providing procedures by which that quota may be ascertained, giving the alleged delinquents a hearing and providing further that the total amount of the delinquency so ascertained may be declared a lien on the property which the defendant had at its passage, and that it may be sold as under foreclosure. Thus no question under this statute can arise as to liens for taxes upon property which the delinquent has sold off before the passage of the act.

“The same right to collect arrearages of taxes is generally recognized. ‘Unless there be some constitutional restriction the Legislature may authorize a municipality to levy and collect retrospective taxes, and for this purpose use the assessment roll of a previous year. . . .’ There is no hardship in this proceeding. It is essentially just. It merely compels taxpayers who have evaded their share of the public burdens to fulfill their duty, and to that extent relieves those who have faithfully borne the heat and burdens of the day and will discourage like evasions in the future.”

<sup>15</sup>91 N. C. 125 (1884).



and authority hereby granted shall cease on 1 January, 1884."<sup>16</sup> This action was to enforce collection of taxes under that act. The lower court held that the act was unconstitutional and inoperative. Upon appeal, the lower court was reversed. Said Smith, C. J., at page 128: "It would thus seem that the possession of the power to remove the obstruction arising from the lapse of time, and again exposing the delinquent taxpayer to the remedies provided for the enforced payment when it is due, has been so long exercised, and promptly vindicated by judicial decision when denied, that it must now be settled beyond the reach of controversy. . . . Such an enactment does not operate upon the debt, or liability of the taxpayer, which remains as before, but is simply a removal of a restriction imposed upon the collector upon grounds of public policy in cases in which it is deemed proper to grant the indulgence."

An Act<sup>17</sup> reviving the right to collect delinquent taxes, for the benefit of sureties on the collector's bond, was assumed to be valid in *Moore v. Sugg*.<sup>18</sup> Thus, real estate which had escaped taxation by the passage of time, was again made liable for sale to satisfy the lien of those out-of-date taxes. And this right was revived, not for the benefit of the taxing unit or public at large, but for the benefit of the sureties on the collectors' bonds, the taxes having been already settled with the taxing units. The case arose upon an application for injunctive relief, the plaintiff contending that he was an innocent purchaser without notice that back taxes were unpaid. But neither the plaintiff nor the court appeared to question the validity of the act.

Coming to more modern times, we find a series of acts empowering sheriffs and tax collectors to collect back taxes after collection had already become barred being upheld in *Hunt v. Cooper*,<sup>19</sup> which seems to be in point with the question under consideration. This was an action to restrain the sale of land for back taxes, and to recover taxes for other years paid under protest. Section 7998 of the Consolidated Statutes of 1919 limited the time for the collection of taxes to one year from the day prescribed for the settlement of taxes, and under that statute the collection of taxes for which the land was being sold would have been barred, except for the series of acts extending the right to collect back taxes. The court held the acts effective to permit the collection of taxes which had not been collected within the time limited.

The series of acts discussed in *Hunt v. Cooper* began in 1921. The Legislature of that year passed "An act for the relief of sheriffs and tax collectors,"<sup>20</sup> which authorized the collection of taxes for the years

<sup>16</sup> N. C. Pub.-Priv. L. 1883, c. 79.

<sup>17</sup> N. C. Pub.-Priv. L. 1891, c. 391.

<sup>18</sup> 112 N. C. 233, 17 S. E. 72 (1893).

<sup>19</sup> 194 N. C. 265, 139 S. E. 446 (1927).

<sup>20</sup> N. C. Pub. L. 1921, c. 33.

1915 to 1920 inclusive, "under such rules and regulations as are now or may hereafter be provided for the payment of taxes." It was provided that the authority thus given should "cease and determine" on January 1, 1923. The 1923 Legislature, after the power to collect such back taxes had "ceased and determined," passed two acts with respect to the same subject. One of them,<sup>21</sup> while making no reference to the 1921 Act, employed identical language except that it covered taxes for the years 1917 to 1922 inclusive and provided that the power should cease January 1, 1924. The other merely extended the authority granted in the 1921 Act to January 1, 1925.<sup>22</sup> After the powers given under both the 1923 acts had lapsed, the 1925 Legislature included taxes for the year 1923 and 1924 and extended the power to make collection of such back taxes to January 1, 1927.<sup>23</sup> Again, after the power granted under the 1925 Act had lapsed, the 1927 Legislature amended the 1925 Act to include taxes for the years 1925 and 1926 and to extend the power to collect back taxes for all the years specified to January 1, 1929.<sup>24</sup>

This series of acts given effect in *Hunt v. Cooper, supra*, has been traced in detail because it furnishes a striking analogy to another series of acts relating to assessments for local improvement, now appearing in our statutes as C. S. 2717(b),<sup>25</sup> which will be discussed later. The important facts to bear in mind with respect to the series of acts outlined above is that the power to collect taxes and therefore to enforce the lien for taxes had been lost by the passage of time before the legislature acted to restore the right of collection and thus to revive the enforceability of the lien; that the power first given had in turn lapsed through the passage of time before being again restored by subsequent legislation, and so on successively; and that the court, in *Hunt v. Cooper, supra*, held that this was within the power of the legislature.

Another series of acts that furnishes an analogy to the successive enactments now codified as C. S. 2717(b) concerns extension of time for the foreclosure of liens of taxes under C. S. 8037<sup>26</sup> which contained a limitation of five years upon actions by counties and municipalities to foreclose tax sale certificates. In 1927 this section was rewritten to provide a limitation of eighteen months.<sup>27</sup>

In 1929 the Legislature provided: "Any certificate of sale in the hands of any person, corporation, firm, county or municipality *on which*

<sup>21</sup> N. C. Pub.-Priv. L. 1923, c. 108. This Act was incorporated into the Consolidated Statutes, Vol. III (1924) as §8005(a)-(d).

<sup>22</sup> N. C. Pub.-Priv. L. 1923, c. 201.

<sup>23</sup> N. C. Pub. L. 1925, c. 80.

<sup>24</sup> N. C. Pub. L. 1927, c. 89.

<sup>25</sup> N. C. CODE ANN. (Michie, 1939) §2717(b).

<sup>26</sup> N. C. CODE ANN. (Michie, 1939) §8037. Repealed, N. C. Pub. L. 1939, c. 310, §1725.

<sup>27</sup> N. C. Pub. L. 1927, c. 221.

an action to foreclose has not been brought, which according to the terms of chapter two hundred and twenty-one of the Public Laws of one thousand nine hundred and twenty-seven should have been brought, shall have until December first, one thousand nine hundred and twenty-nine to institute such action. This action and extension shall and does include all such certificates whether the same were issued for the sale of one thousand nine hundred and twenty-seven taxes and any and all certificates sold or issued prior thereto."<sup>28</sup> (Italics ours.)

After the time extended by the 1929 Legislature had lapsed, the 1931 Legislature amended the 1929 Act to extend the time for bringing tax sale certificate foreclosures to December 1, 1931.<sup>29</sup> The 1929 Act was considered in *Wilkes County v. Forester*<sup>30</sup> and *Forsyth County v. Joyce*,<sup>31</sup> both decided at the same term, both being actions to foreclose tax sale certificates under C. S. 8037, both involving taxes for the years 1924 and 1925, and in both cases the plea of the 18 months statute of limitations under the 1927 Act was interposed. The *Wilkes County* Case held that the action was barred and was not revived by the 1929 or the 1931 Act. The *Forsyth County* Case held that the action was maintainable, upholding and giving effect to the Act of 1929. The latter case could not have reached the result it did, certainly with respect to the certificate purchased in 1925 for 1924 taxes and the certificate purchased in 1926 for 1925 taxes without holding the 1929 Act valid and within the power of the legislature.

At first glance the two cases seem to be hopelessly irreconcilable. A careful study of the cases, however, reveals that they are not necessarily at odds, and that a logical and tenable distinction may be drawn. It is true that Justice Clarkson, writing the opinion in the *Wilkes County* Case, said (p. 170): "Whatever may be the holdings in other jurisdictions, we think this jurisdiction is committed to the rule that an enabling statute to revive a cause of action barred by the statute of limitations is inoperative and of no avail." Not only do the North Carolina cases cited in the opinion fail to bear out this statement, unless dicta be given more weight than the actual decisions where the matter had to be passed upon, but the statement was not necessary to the decision in the *Wilkes County* Case. Under the factual situation presented and the peculiar language employed in the 1929 and 1931 Acts pointed out by Justice Clarkson,<sup>32</sup> the same results could have been reached without reference to the constitutionality of the 1929 and 1931 Acts. Since the action in the *Wilkes County* Case was barred under either the 1927 or the 1929 Act, and since the court held that the 1931

<sup>28</sup> N. C. Pub. L. 1929, c. 204.

<sup>29</sup> N. C. Pub. L. 1931, c. 260.

<sup>30</sup> 204 N. C. 163, 167 S. E. 691 (1933).

<sup>31</sup> 204 N. C. 734, 169 S. E. 655 (1933).

<sup>32</sup> 204 N. C. 163, 165, 167 S. E. 691, 692 (1933).

Act was not applicable to the case, the question of the constitutionality of the 1929 and 1931 Acts was not before the court. Certainly, it was not necessary to pass upon the constitutionality of the Act as it was in the *Forsyth County Case*.

Justice Clarkson cited with approval the case of *Hunt v. Cooper*, discussed above, but stated that the instant case was different in that the statute of limitations was involved. If there is a distinction in principle between the two cases it is a distinction without a difference; for both cases were concerned with the attempt to subject real estate, which had come under the protection of a time limitation, to a lien for taxes by virtue of subsequent legislation. And so again, the true ground upon which the decision in the *Wilkes County Case* must rest is the inapplicability of the statutes subsequently enacted, not their unconstitutionality.

The case of *Whitehurst v. Dey*<sup>33</sup> appears to be the earliest and most often cited case upon the categorical proposition that attempts by the legislature to revive barred actions are unconstitutional and void. It is almost invariably cited by text-writers who put North Carolina in the column of states denying to the legislature the right to revive barred actions. In this case the Supreme Court reversed a judgment for the plaintiff upon an indebtedness against defendant's testator on the ground that the running of the statute of limitations was not suspended by promises to pay the debt. Although this was a sufficient basis for the decision, the court discussed the plaintiff's contention that his claim was preserved by an intervening statute as follows:<sup>34</sup> "It is next contended that the amendatory act of 1881 has a retrospective operation and requires in the count of time the elimination of so much as elapsed after the filing of the claim in 1874. . . .

"A reasonable and fair interpretation of this latter clause will confine it to such claims as had already been filed and had not then become barred; and this, as it meets the requirements of the act, without disturbing rights that time has settled and fixed, must be assumed to have been the intention of the general assembly in its passage. Where, of two reasonable constructions of a statute, the one of which the legislature is clearly competent to enact, while the other infringes upon the constitution, the former will be accepted as its meaning; because it will not be supposed that an unauthorized power was intended to be exercised. This rule of construction prevails in the enforcement of laws of doubtful import and is acted upon by the courts. . . .

"If, however, we are compelled by the general words used to extend the enactment so as to embrace claims which had become remediless by action at the time of its passage, and impart new life and activity

<sup>33</sup> 90 N. C. 542 (1884).

<sup>34</sup> N. C. Pub. L. 1881, c. 80.

to the obligation, we should be disposed to hold its operation in these cases to be an impairment of vested rights and as falling within the inhibition of the federal constitution, notwithstanding the doubts expressed by Mr. Justice Reade in *Pearsall v. Kenan*, 79 N. C. 472, based upon the ruling in *Hinton v. Hinton*, 61 N. C. 410."

Three points should be noted with respect to the *Whitehurst* Case in assessing its value as a precedent on the point under discussion:

1. The principal question involved, as stated by the court, was the effect that the defendant's successive promises to pay had on the running of the statute of limitations.

2. The court chose to refuse to give effect to the amendatory act of 1881 as a matter of judicial construction of legislative intent to give the act prospective effect only, rather than to declare the act unconstitutional as applied to this case.

3. The court stated that if it were compelled to construe the act to embrace claims which had already become remediless at the time of its passage it would be "disposed" to hold its operation in those cases to be an impairment of vested rights and as "*falling within the inhibition of the federal constitution.*" (Italics supplied.)

As to point 1, it is worthy of notice that the court stated that it was "the only point presented in the record for our consideration." As to point 2, the court could construe the legislative intent (that the Act was not intended to have retroactive effect) without reference to the constitutionality of the Act. As to point 3, it is noted that the court admitted that its discussion with reference to the validity of an act purporting to revive rights of action after the bar has operated was dicta and not necessary to the decision of the case. And it is further noted that the court stated that if such holding were necessary it would be "disposed" to so hold upon the ground that such act fell "within the inhibition of the federal constitution."

In *Campbell v. Holt*<sup>35</sup> the Supreme Court of the United States held that the repeal of a statute of limitations upon actions upon debts does not deprive the debtor of his property in violation of the Fourteenth Amendment to the Constitution, although at the time of the repeal of the statute the right of action had already become barred. In denying that a person could acquire a vested right in the denial of a remedy to his creditor the court said at p. 629:

"We can understand a right to enforce payment of a lawful debt. The Constitution says that no State shall pass any law impairing this obligation. But we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the

<sup>35</sup> 115 U. S. 620, 6 Sup. Ct. 209, 29 L. ed. 483 (1885).

promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law, because its effect is to make him fulfill his honest obligations."

Thus the constitutional basis for the dictum in *Whitehurst v. Dey*, *supra*, was rejected by the Supreme Court of the United States the following year, and the Supreme Court of the United States has held many times since that retroactive features of a statute, especially tax legislation, are not necessarily invalid.<sup>36\*</sup> It is submitted that the *Whitehurst* Case dictum has not been followed by any North Carolina case in which the application of the dictum was necessary to the decision.

A study of the history of *Whitehurst v. Dey* reveals that it has been cited by our Supreme Court thirteen times. In four cases it was cited upon the question of estoppel to plead the statute of limitations.<sup>37</sup> In one case<sup>38</sup> it was cited in support of the statement that the legislature has power to pass a statute barring claims against counties unless presented within two years. One case<sup>39</sup> cited it in connection with the formal requirements of "filing" a claim against a decedent's estate. Only seven cases have repeated the *Whitehurst* dictum, and of those seven, two refused to follow the dictum and gave effect to statutes reviving lost rights,<sup>40</sup> four referred to the dictum in a speculative

<sup>36\*</sup> *Campbell v. Holt* was followed in *United States v. Chicago and E. I. Ry. Co.*, 298 Fed. 779 (D. C. Ill. 1924). The Revenue Act of 1916, Section 9(a) had provided that in cases of "erroneous, false or fraudulent returns," the commissioner might make assessment of income and excess profits taxes at any time within three years after the return is made. The Revenue Act of 1921, Section 250(d), provided that taxes due under prior acts may be assessed within five years after the return is filed, and that in case of a "false or fraudulent return with intent to avoid the tax," assessment may be made at any time. Held, such provisions were effective to extend the time to five years for making assessment on an erroneous return, although more than three years had elapsed after such return before the passage of the act of 1921.

Except in gift tax cases based upon peculiar grounds [see *Untermeyer v. Anderson*, 276 U. S. 440, 48 Sup. Ct. 353, 72 L. ed. 645 (1928)] the Supreme Court of the United States seems to be not greatly worried about the constitutionality of retroactive tax legislation, either state or federal, in so far as the federal constitution is concerned. In *Welch v. Henry*, 305 U. S. 134, 59 Sup. Ct. 121, 83 L. ed. 87 (1938) the court pointed out that for more than seventy-five years it had been a familiar legislative practice of Congress in the enactment of revenue laws to tax retroactively income or profits received during the year of the session in which the taxing statute is enacted, and in some instances during the year of the preceding session. Said the court: "The contention that the retroactive application of the Revenue Acts is a denial of the due process guaranteed by the Fifth Amendment . . . has been uniformly rejected." (Citing cases.)

<sup>37</sup> *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873 (1939); *Wilson v. Clement*, 207 N. C. 541, 177 S. E. 797 (1934); *Town of Franklin v. Franks*, 205 N. C. 96, 170 S. E. 113 (1933); *Tomlinson v. Bennett*, 145 N. C. 279, 59 S. E. 37 (1907).

<sup>38</sup> *Royster v. Commissioners*, 98 N. C. 148, 3 S. E. 739 (1887).

<sup>39</sup> *Home Corporation v. Creech*, 205 N. C. 55, 169 S. E. 794 (1933).

<sup>40</sup> *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9 (1898); *Jones v. Arrington*, 91 N. C. 125 (1884).

manner and then went forward to a decision upon other grounds,<sup>41</sup> and only one appeared to give effect to it.<sup>42</sup>

On examination of the foregoing cases we see that the "leading" case of *Whitehurst v. Dey* amounted to no more than dictum upon the question of the right of the legislature to revive actions already barred; that such dictum was founded upon a supposed inhibition to be found in the Constitution of the United States; that the Supreme Court of the United States has since denied that such inhibition exists; and that the dictum in the *Whitehurst* Case itself has never since been cited by the Supreme Court of North Carolina as controlling authority in any case in which the question had to be passed upon. The nearest the Court has come to applying the dictum was in *Wilkes County v. Forester, supra*, and with respect to that case it was seen that: (1) under the fact situation and the construction of the court (and, indeed, the express language of the Acts), the validity of the Acts declared invalid was not involved, and (2) at the same term of Court (*Forsyth County v. Joyce, supra*) when the question had to be dealt with, the same Act was upheld and given effect.

And so we see how a dictum, picked up, repeated and quoted in other dicta, without regard for the facts presented or the points at issue, becomes a part of the "weight of authority"—"weight" being thus determined by the mere quantity or volume, by repetition, by lineage taken up in the reports, rather than by quality and applicability to the question at hand. The curious results of the indiscriminating use of such dicta is well illustrated in the case of *Womens Catholic Order v. Valleytown Township*,<sup>43</sup> which was an action upon bond interest coupons issued by Valleytown Township. Some of the coupons had matured more than two years before the institution of the suit, and defendant pleaded the two-year statute of limitations, C. S. 442, paragraph 1—claims against counties, cities and towns. After the coupons had been due for more than two years, and before the suit was instituted, P. L. 1937, Ch. 359, was enacted providing that the section should not apply to bonds, notes and interest coupons. The district court held that the 1937 Act revived the action, upon authority of *Hinton v. Hinton, supra*, and *Campbell v. Holt, supra*. Upon appeal the district court was reversed,<sup>44</sup> the circuit court stating that in North Carolina it was settled that an action upon an open account, barred by the statute of limitations, could not be revived by subsequent legisla-

<sup>41</sup> *High Point v. Clinard*, 204 N. C. 149, 137 S. E. 690 (1933); *Vanderbilt v. R. R.*, 188 N. C. 568, 125 S. E. 387 (1924); *In re Beauchamp*, 146 N. C. 254, 59 S. E. 687 (1907); *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

<sup>42</sup> *Wilkes County v. Forester*, 204 N. C. 163, 167 S. E. 691 (1933).

<sup>43</sup> 32 F. Supp. 894 (D. C. N. C. 1940).

<sup>44</sup> 115 F. (2d) 459 (C. C. A. 4th, 1940).

tion. Authority: *Whitehurst v. Dey*, *supra*. The circuit court went on to hold, as a matter of construction, that the legislature did not intend to give the amendment of 1937 retroactive effect. So again we have a dictum based upon a dictum, and a rather curious result: an intermediate federal court, feeling bound by State Court decisions, citing a dictum of the State Court based upon a supposed federal constitutional objection after that supposed federal constitutional objection had been dissipated by the highest federal authority. If *Campbell v. Holt* had been decided the year before instead of the year after *Whitehurst v. Dey*, it is reasonable to suppose that the dictum in the latter case would never have been insinuated into our line of cases.

We conclude from a study of the North Carolina cases, and the federal cases to the extent the federal constitution is involved, that there is no legal impediment to an act of the General Assembly in making again collectible and enforceable liens for installments of assessments for local improvements more than ten years past due. Whether such enactment would have the effect of reviving a right of action already barred, as upheld in *Hinton v. Hinton*, *supra*, or of empowering the assessment and collection of taxes after the time for taking such action had already elapsed, as upheld in *R. R. v. Commissioners of Alamance*, *supra*, or of extending the power to sell land for taxes after the power had already ceased, as upheld in *Hunt v. Cooper*, *supra*, or as an "Act of the sovereign directing the collection of taxes for the years in which the delinquent's property has not paid its quota," as upheld in *Wilmington v. Cronly*, *supra*, or as the removal of an "obstruction arising from the lapse of time," as upheld in *Jones v. Arrington*, *supra*, or would set a new period (after the expiration of the old) within which the institution of suit would not be barred, as upheld in *Forsyth County v. Joyce*, *supra*, should be of no great concern to the municipalities. Important is the fact that enabling acts, extensions of time, renewals of power and removals of obstructions have been enacted from time to time and uniformly upheld by our court when the chips were down and the case could not be decided on some other point.

The above discussion and conclusion is particularly applicable to cases involving taxes and assessments. The application and effect of statutes of limitations are matters referred to public policy. The highest expression of public policy is to be found in the Constitution. Where the Constitution is silent, the public policy declared by the legislature is decisive, and if not contrary to that expressed by the Constitution nor contrary to a positive injunction found therein, it should be given effect by the court. If the legislature should declare as a matter of public policy that all property benefitted by local improvements should bear its fair share of the burden rather than being allowed to escape to



the undeserved injury of the general taxpayer, and that where property has escaped its fair share of the burden by reason of the passage of time, indulgence or neglect of collectors or other causes, it may be reassessed or obstructions to collections removed, there seems to be no constitutional objection to giving effect to such declared policy if couched in effective terms.

As a matter of fact, our Constitution encourages, rather than discourages an effective legislative declaration along the lines indicated. It positively declares the public policy with respect to the matter. "The power of taxation shall be exercised in a just and equitable manner. . . . Taxes on property shall be uniform as to each class of property taxed."<sup>45</sup> Where is the justness or equity in making property which has paid in full for benefits received from improvements pay again because other property has received benefits but has shirked its burden? When property thus specially benefitted is made to assume its burden, justness, equity and uniformity will be restored rather than destroyed.

## 2. HAS THE LEGISLATURE ALREADY ENACTED LEGISLATION WHICH MAY ENABLE MUNICIPAL CORPORATIONS TO SAVE THEIR ASSESSMENTS FROM THE BAR OF THE STATUTE?

In discussing this question we are particularly referring to that statute embodying a series of acts or amendments, now appearing as C. S. 2717(b). That section is captioned "Extension of time for payment of special assessments."<sup>46\*</sup> It appears in the Code as an amendment to or as an addition to C. S. 2717—"Payment of assessment enforced," as also does C. S. 2717(a)—"Sale or foreclosure for unpaid assessments barred in ten years; no penalties." In other words, all three sections relate to the same subject—the collection of special assessments—and all should be read together in order to arrive at their intent and purpose in the light of the situation existing at the time of their enactment. Therefore, before tracing the history of C. S. 2717(b) and drawing our analogy and conclusion, let us take a brief look at the background—the situation existing at the time it first made its appearance—

<sup>45</sup> N. C. CONST., Art. V, §3.

<sup>46\*</sup> "Extension of time for payment of special assessments. At any time or times prior to July the first, one thousand nine hundred and forty-two, the governing body of any city or town may adopt a resolution granting an extension of the time for the payment of any installment or installments of any special assessment, including accrued interest thereon and costs accrued in any action to foreclose under the lien thereon, by arranging such installment or installments, interests and costs into a new series of ten equal installments so that one of said installments shall fall due on the first Monday in October after the expiration of one year after adoption of the aforesaid resolution and one of said installments on the first Monday in October of each year thereafter." (As amended by c. 160, Pub. Laws 1941.) The statute was amended by c. 4, Sess. L. 1943 to extend the power to February 1, 1945,

in order to better understand what the Legislature intended to accomplish thereby.

C. S. 2717 was enacted as a part of the original act providing state-wide machinery for making and assessing costs of local improvements.<sup>47</sup> It was first amended in 1923 with respect to the time from which interest should run.<sup>48</sup> In 1929, it was again amended, by the same act that enacted C. S. 2717(a), to provide for the reinstatement of installments upon the payment of those past due.<sup>49</sup>

In 1929, the effects of the great orgy of local improvements were being felt. When the Legislature met that year the collapse of the stock market was still ten months away, but the great land boom in Florida and the lesser boom in North Carolina had billowed and burst, leaving deflated real estate values burdened with assessment installments past due and installments to come. The problem of assessments and delinquencies was becoming acute—so acute that when Will Rogers appeared in Raleigh while the legislature was in session and told the story of a committee of citizens offering to turn the country back to the Indians as a gift, no one appeared to miss the point of the story when he further told how the Indians, after consideration, agreed to accept the land back, provided the street assessments were cancelled.

And so the first material change in the law of 1915 came in 1929, after the land boom had subsided but while the country as a whole was still happily counting its paper profits. The changes made (1) provided for the reinstatement of unpaid balances upon an installment basis upon bringing installments up to date by paying those past due, and (2) that no statute of limitations, whether contained in some local act, some other statute, or otherwise provided would bar assessments before the expiration of ten years. This displayed a policy of leniency toward persons owing assessments and tended to encourage forbearance in bringing suits by allaying fears that some shorter period might operate to bar foreclosure. The statute further aided property owners by providing that, instead of penalties prescribed for failure to pay taxes (just reduced from 20% and 10% on tax sale certificates to 12% and 8% by Ch. 204) special assessments should only bear interest at 6%.

#### THE HISTORY OF C. S. 2717(b)

In 1931, with the bank holiday still two years off, the situation was no less critical. There were more delinquencies rather than fewer. The legislature again acted to permit municipalities to grant indulgences to those owing past due assessments by enacting Ch. 249, P. L. 1931 which, as amended, is now C. S. 2717(b).

<sup>47</sup> N. C. Pub. L. 1915, c. 56.

<sup>48</sup> N. C. Pub. L. 1923, c. 87.

<sup>49</sup> N. C. Pub. L. 1929, c. 331.

C. S. 2717(b) as originally enacted, authorized the governing body of any city or town, prior to July 1, 1933 to grant extensions of time for the payment of any past due installments, by tacking the delinquent installments on to the end of the original installments. Certain provisos, unimportant to this discussion, were annexed.

In 1933, with the bank holiday in the foreground of one of the blackest pictures ever faced by the nation in war or peace, with delinquencies the rule rather than the exception, when many pieces of property could not be sold on the open market for the amount of the unpaid installments of special assessments, the legislature amended the 1931 act by rewriting it. In order to further encourage forbearance, in order to ease the pressure upon harassed property owners, and in order to remove the necessity of proceeding to foreclosure at that time and throw still more distressed property upon a paralyzed market, the act provided that cities and towns might extend the payment of any installment and accrued interest thereon due prior to July 1, 1932, the extended installments to be tacked on to the end of unmatured installments. This action was authorized to be taken at any time prior to July 1, 1935. The proviso in the 1931 Act, that all accrued interest must be paid up as a condition precedent to extension, was dropped.

Again in 1935, the legislature amended the section to authorize the governing bodies, by resolution at any time prior to July 1, 1936, to extend any installment or installments, including accrued interest and costs accrued in any foreclosure actions, by arranging the assessments into a new series of ten annual installments.<sup>50</sup> This power to extend, rearrange and make current all installments was extended to July 1, 1938;<sup>51</sup> to July 1, 1940;<sup>52</sup> to July 1, 1942;<sup>53</sup> and finally extended to February 1, 1945.<sup>54</sup> So that ever since 1931 successive legislatures have renewed and extended the power of municipalities to bring forward and make current (and even to make payable at some future date) all delinquent installments, and *this power is now in existence and will continue until February 1, 1945.*

DOES C. S. 2717(b) PROVIDE A MEANS OF AVOIDING THE BAR  
OF C. S. 2717(a)?

What are the implications of C. S. 2717(b)? To what extent does it qualify or place a condition upon the operation of C. S. 2717(a)? Suppose a city council should look in its books and, finding thereon delinquent assessments that have been past due since 1922, adopt a resolution extending the time for the payment of such installments and

<sup>50</sup> N. C. Pub. L. 1935, c. 126.

<sup>51</sup> N. C. Pub. L. 1937, c. 172.

<sup>52</sup> N. C. Pub. L. 1941, c. 160.

<sup>53</sup> N. C. Pub. L. 1939, c. 198.

<sup>54</sup> N. C. Sess. L. 1943, c. 4.

arrange them into a new series, as now authorized by statute? Ever since 1931, C. S. 2717(b), as amended and extended by successive legislatures, has been a part of the law relating to the collection of special assessments. It has given and still gives municipalities the power to bring forward, renew, remove from the delinquent status, and rewrite any delinquent installments. While the court held, in *Raleigh v. Bank*, *supra*, that C. S. 2717(a) was an independent ten-year statute of limitations, the application and effect of C. S. 2717(b) was not discussed either in the briefs of counsel or the opinion of the court. It was not before the court for construction. It did not appear that Raleigh had attempted to exercise the power given by the section. But is not the operation of C. S. 2717(a) conditioned or dependent upon the non-exercise of the power granted by C. S. 2717(b) within the time limited? In short, may not a municipality now bring all of its delinquent installments up to date and even project them into the future, regardless of age?

The legislature may grant this power to municipalities unless in doing so it violates some provision of the United States or State Constitution. The federal cases cited above would seem to clear the way so far as federal constitutional questions are concerned, even if C. S. 2717(b) is considered as an act to remove the bar after it has already fallen, rather than as a condition annexed to the statute of limitations. As to the State Constitution, we find no express or implied inhibition; indeed, since the levy of special assessments is referred to the taxing power, we find express authority for the type of statute under consideration. Our Constitution provides: "The General Assembly shall not pass any local, private, or special act or resolution relating to . . . extending the time for the assessment or collection of taxes. . . . The General Assembly shall have power to pass general laws regulating matters set out in this section."<sup>55</sup> We are concerned with a general law relating to the extension of time for the collection of special assessments, a species of tax.

The Supreme Court of North Carolina has not construed C. S. 2717(b), but it has passed upon the effect of somewhat similar acts, and has uniformly sustained them, even when such acts have opened the way for collection of taxes twenty years old. Let us therefore compare C. S. 2717(b) with the statutes that have been passed upon and see what analogies may be drawn.

To begin with, it will be noted that C. S. 2717(b) authorizes the extension of "any installment or installments of any special assessment, including accrued interest thereon and cost accrued in any action to foreclose under the lien thereon." The statute was first enacted two

<sup>55</sup> N. C. CONST. Art. II, §29.

years after C. S. 2717(a), and it contains no limitation other than one upon the time within which the power thus granted must be exercised. In *Wilmington v. Cronly*, *supra*, where an act of 1895<sup>56\*</sup> authorized collection of taxes which had long since become uncollectible, the court held squarely that plaintiff's right to recover depended upon the Act of 1895. Said the court at p. 387: "2. The other exception is that the court did not hold that arrearages of taxes were protected by the three years statute of limitations . . . a tax, though in one sense a debt, is something more, and is not liable to the incident of debts between individuals. It needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein—*nullum tempus occurrit regi*—and the act in question . . . authorizing the State, county, and city to recover these delinquent taxes contains no limitation, and neither the ten years nor the three years statute applies."

Note that in the above quotation the maxim *nullum tempus occurrit regi* was applied to the enabling Act of 1895, and not to the earlier statute which limited the period of collection. C. S. 2717(b) likewise contains no period of limitation and the maxim should likewise apply to it.

With respect to the validity of the Act of 1895, the court further said (p. 386): "1. Did the General Assembly have power to pass the Act of 1895 empowering the State, county, and city to collect arrearages of taxes? It is well settled that it has. In *R. R. v. Commissioners of Alamance*, 82 N. C. 259, Smith, C. J., says: 'If a definite unpaid tax, collectable within less than two years after it is levied may be enforced by legislative permission years afterwards for the benefit of the collector and his sureties, it would seem that there could be no legal impediment to the State's compelling the payment of its own just demands against the delinquent taxpayer when they are ascertained in the mode prescribed by law.' And, further, 'The retrospective features of the act are not fatal to its validity. . . . No vested rights are involved. No wrong is done by the means employed to correct a common error and prevent an unjust and unintended exemption.'"

A retroactive statute which permitted the assessment and collection of taxes years after the right of assessment and collection had been barred or lost was upheld in *R. R. v. Commissioners*.<sup>57</sup>

<sup>56\*</sup>N. C. Pub. L. 1895, c. 182. Section 1 of the act provides as follows: "That the state of North Carolina, the county of New Hanover, and the city of Wilmington may bring their joint or several action or actions in the superior court of New Hanover county, for the enforcement and collection of all claims in favor of said state, county, and city, for delinquent taxes against any person or property, whose names appear delinquent on the tax books or list of said city or county, and the said superior court shall have jurisdiction to have, try and determine the same."

<sup>57</sup>82 N. C. 259 (1880).

Compare the series of enactments now embodied in C. S. 2717(b) with that series of enactments "For the relief of sheriffs and tax collectors" upheld and given effect in *Hunt v. Cooper*, 194 N. C. 265, 139 S. E. 466 (1927). In that case, the first act of 1921 empowered collectors to proceed to collect taxes as far back as those for 1915, after the taxes had already become uncollectible under the current law. At any rate, the officers charged with the power and duty to collect taxes could no longer take any action with respect to them for those years; and a property owner could have successfully resisted any effort to collect or subject his property to sale *except for the legislation enacted subsequent to the erection by time of his defense*. C. S. 2717(b) is much milder: it has empowered cities and towns, by appropriate action, to move their delinquencies ahead to the current or unmaturing accounts, and thus prevent the installments from becoming uncollectible. A property owner does not have as much reason to feel that his defense to an action on delinquent assessments has become absolute as long as the time within which the powers given under C. S. 2717(b) has not expired as he had with respect to actions for delinquent taxes before the passage of the 1921 Act. For, viewing the whole law on the subject, he would have good reason to feel that he had a defense because of the passage of time and the indulgences granted him *only if the city should fail to extend the time for payment within the time authorized by C. S. 2717(b)*. And, as pointed out, that time does not expire until February 1, 1945.

Comparison might also be made with an act reviving the right to foreclose tax sale certificates which was held effective in *Forsyth County v. Joyce*, *supra*. There was the 18-months statute of limitations under the Act of 1927. There was the Act of 1929, *enacted after the 18 months had elapsed*, authorizing actions to foreclose any certificates which, under the 1927 Act, had not been instituted within the time limited by the Act. The 1929 Act gave to holders of certificates who had already lost their right of action until December 1, 1929 to institute their actions.

Suppose the legislature, instead of waiting two years to pass the Act of 1929, had attached a proviso to the Act of 1927 as follows: "*Provided*, that any county or municipality holding any tax sale certificate may, instead of instituting suit within 18 months of the date thereof, extend the time for the payment thereof by resolution duly adopted at any time prior to December 1, 1929 and may thereafter institute suit upon such certificates within 18 months from such extended time for payment." Would not such a proviso have done much less violence to the concept of vested rights than the Act of 1929 which was given effect? Suppose a city, with such a proviso in effect, had

failed to institute suit before the expiration of 18 months but had adopted a resolution in November of 1929 extending the time for payment and had thereafter instituted suit within 18 months of such extended time. Would the Court have any constitutional difficulty in holding that the action was maintainable? For the effect of such act with the supposed proviso would be to give holders of tax sale certificates the choice between (1) bringing suit within 18 months, or (2) extending time for payment by appropriate action taken prior to December 1, 1929 and bringing suit within 18 months after such extended time for payment. It is submitted that such hypothetical case would be much milder and more easily sustained than the actual case that was sustained. It is further submitted that C. S. 2717(b) approximates the relationship to C. S. 2717(a) that the supposed proviso would have borne to the Act of 1927, and that reading C. S. 2717(a) and 2717(b) together, the effect is to give municipalities the choice of: (1) bringing suit upon each installment within ten years, or (2) forbearing to sue, but extending the time for payment by appropriate resolution at any time prior to the expiration of such power and bringing suit within ten years after such extended time for payment.

We conclude, from a study of the foregoing cases and the acts therein applied, that there is ample precedent for our Supreme Court to give effect to resolutions extending the time for the payment of any special assessment—certainly those which were not more than ten years past due upon the ratification date of the Act of 1931, carried forward as C. S. 2717(b), and perhaps even as to installments that were more than ten years past due on that date. There appears to be no definitely decided cases to the contrary.

It has been shown that every act of the legislature purporting to extend the time for the collection of taxes, including the foreclosure of liens upon real estate, has been upheld by the Supreme Court in every instance in which the point has been directly at issue. The reasoning of those cases and the requirements of public policy expressed therein apply with equal force to C. S. 2717(b). The acts reviving the right to collect taxes included the revival of the right to foreclose liens upon real estate, sometimes by express language and sometimes by implication. Surely the Court can as easily hold that C. S. 2717(b) authorizes and empowers municipalities to take the action indicated therein with the effect of keeping delinquent assessments from becoming uncollectible. Surely, this power is less strained than the power of reviving the right to collect after it has been lost through the passage of time.

One more similarity should be pointed out between the acts for the relief of sheriffs and tax collectors and other acts reviving the right

to collect taxes and C. S. 2717(b): those acts did not in themselves and by themselves effect collection. They merely empowered the proper officials to institute such steps, *within a definite time limit*, which would result in collecting *previously uncollectible taxes*. C. S. 2717(b) merely authorizes municipalities by taking appropriate action *within a definite time limit, to prevent assessments from becoming uncollectible*.

We therefore submit that the General Assembly by the passage and extension of C. S. 2717(b), has already provided a means whereby cities and towns may keep their delinquent assessments collectible, if the court will construe such to have been the legislative intent. And it is further submitted that in view of the background of delinquencies existing at the time of the passage of the Act and the conditions existing at the times of its extension, together with the fact that the Act has very little meaning in the absence of such legislative intent, a very strong argument can be made in support of such construction. This construction was suggested by Justice Devin in writing the majority opinion in *Raleigh v. Mechanics and Farmers Bank, supra*, when he said, at page 291: "It would seem also that succeeding legislatures also considered that the Act barred foreclosure suits on assessment installments ten years past due, for in 1931, and again in 1933, and again in 1935, and again in 1937, and again in 1939, and again in 1941, and again in 1943, municipal corporations were given the right by resolution to extend the time of payment of installments, *which would enable them to avoid the bar of the statute, if they desired to do so.*" (Italics ours.)